In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 517

LEWIS W. TWOMBLEY, PETITIONER

v.

CITY OF LONG BEACH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO REQUEST FOR CONSOLIDATION

Petitioner, as a citizen, resident, and taxpayer of the City of Long Beach, California, filed a complaint against the City, the State, and officials of both, to establish that the City's ownership of tide and submerged lands within the city limits is not subject to any trust imposed by the State, and to enjoin payment to the State of any part of the income derived from such tide or submerged lands. See Pet. App. The district court dismissed the complaint for

failure to state a cause of action (Pet. App. xxxi-xxxv), and the court of appeals affirmed (Pet. App. i-vii). Petitioner now seeks a writ of certiorari to review the judgment of the court of appeals, and also asks that the case be consolidated with *United States* v. *California*, No. 5, Original (Pet. 17).

The United States is not a party to No. 517 and is in no way concerned with any issue involved in that case. Therefore we take no position as to whether a writ of certiorari should be granted. However, the United States does oppose the request for consolidation of this case with No. 5, Original.

The only ground for consolidation of cases under Rule 42(a) of the Federal Rules of Civil Procedure and Rule 9(2) of this Court, or for consolidated argument under Rule 43(5) of this Court, is the presence of a common question of law or fact. Petitioner does not point out, and we are unable to discover, any controverted question of law or fact common to No. 517 and No. 5, Original.

United States v. *California*, now No. 5, Original, was brought by the United States to establish its right, as against the State of California, to the submerged lands and resources lying within a distance of three geographical miles seaward from the line of ordinary low water and from the outer limit of inland waters along the California coast. After that right was sustained by this Court in 1947 (332 U.S. 19), proceedings were had before a Special Master to define more particularly the line of ordinary low water and the outer limit of inland waters from which the three miles should be measured. The Spe-

cial Master's Report was received by the Court on November 10, 1952 (344 U.S. 872), and in January 1953 both parties filed exceptions to it. Then on May 22, 1953, the President approved the Submerged Lands Act, giving to California or its grantees the submerged lands and resources within three geographical miles seaward from the line of ordinary low water and from the outer limit of inland waters. 67 Stat. 29, 43 U.S.C. 1301-1315. No further judicial action was taken in the case until 1963, when the United States sought and secured (375 U.S. 927) leave to file a supplemental complaint, asserting its right to the submerged lands more than three geographical miles seaward from the line of ordinary low water and from the outer limit of inland waters, essentially the same line that had been in issue before the Special Master. California has answered the supplemental complaint, both parties have filed new exceptions to the Special Master's Report, with supporting and opposing briefs, and on June 22, 1964, the Court granted their joint motion for oral argument on those exceptions (377 U.S. 986). The issues on that argument will be the location of the boundary between the submerged lands and resources retained by the United States and those given to the State or its grantees by the Submerged Lands Act, and California's contention that the Special Master's Report is not an appropriate basis on which to proceed under the supplemental complaint.

On the other hand, No. 517 concerns only the relative rights of the State of California and the City of Long Beach in the tide and submerged lands within

the city limits. The city limits of Long Beach are three miles seaward from the line of ordinary high tide (Pet. App. x). By the Submerged Lands Act the United States relinquished the submerged lands within three miles of the line of ordinary low water (which of course is seaward of the line of high tide) or within three miles of the outer limit of inland waters. Secs. 2, 3, 67 Stat. 29-30, 43 U.S.C. 1301, 1311. The entire waterfront of Long Beach lies within the Long Beach breakwater, which the United States has conceded marks the outer limit of inland waters within the meaning of the Submerged Lands Act. See U.S. Coast & Geodetic Survey Chart No. 5148; Amended Exceptions of the United States (No. 5, Orig.), p. 17. Thus, under no view can the area concerned in No. 517 even touch the area disputed in No. 5, Original. No. 517 raises no questions as to the location or boundaries of the areas granted or retained by the United States under the Submerged Lands Act. It concerns only the question of whether or to what extent the City or the State is the true recipient, in view of applicable State law, of rights that the United States relinquished by the Submerged Lands Act "to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States." Sec. 3(a), 67 Stat. 30, 43 U.S.C. 1311(a).[1]

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[1] The issues in No. 517 have been brought before the Court in No. 5, Original, by two *amicus curiae* briefs filed by Mr. Carl Whitson. (Presumably one of these is the brief referred to at page 17 of the Petition in No. 517 as having been filed by the petitioner.) Both the United States and the State of

Since there is no question of law or fact common to the two cases, there is no basis for consolidation. Even if some common question could be found, consolidation of the two cases should be denied. The legal and factual issues in No. 5, Original, are so complicated that the Court, by its order of June 22, 1964, has allowed each party two hours for oral argument. It would be undesirable to complicate the situation further by interjecting into the same argument the fundamentally different questions presented by No. 517.[2]

For the foregoing reasons, the request to consolidate No. 517 with No. 5, Original, should be denied.

Respectfully,

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Solicitor General.

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Attorneys.

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California have expressed the view that these issues are irrelevant to that case. See Memorandum for the United States in Opposition to Motion for Leave To File Petition in Intervention (No. 5, Orig.), p. 4; State of California's Response to Amicus Curiae Brief Heretofore Filed by Carl Whitson, etc. (No. 5, Orig.).

[2] Furthermore, if petitioner actually seeks consolidation of the two cases, rather than mere combined argument, the procedural difficulties of consolidating an appellate case with an original one seem in themselves sufficient to defeat the suggestion.

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